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No. 04-162

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS MADDOX, WARDEN, *Petitioner,*

v.

LEIF TAYLOR

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In this habeas corpus case, the Ninth Circuit Court of Appeals expressly declined to apply the 28 U.S.C. § 2254(e)(1) presumption of correctness for State-court factual findings. Then, without holding a federal evidentiary hearing, the Ninth Circuit re-weighed the evidence in the State record and rejected State-court fact and credibility findings that had been rationally based on the testimony of witnesses whose demeanor had been observed by the State trial judge. The Ninth Circuit erred in both respects, and its errors warrant the grant of certiorari.

1. As justification for its refusal to apply the AEDPA-strengthened § 2254(e)(1) presumption, the Ninth Circuit anomalously invoked the separate § 2254(d)(2) provision that, as also adopted in AEDPA, was meant to afford greater rather than lesser protection for State-court criminal judgments attacked in federal proceedings. Further, in employing (d)(2) to avoid the (e)(1) presumption, the Ninth Circuit in effect read back into habeas corpus law the kinds of prerequisites to the operation of (e)(1) that Congress abandoned in its AEDPA reform of the earlier statutory presumption.

The Ninth Circuit's interpretation of (d)(2) as trumping (e)(1) raises an important question of habeas corpus law, departs from this Court's own treatment of and pronouncements on the relationship between (d)(2) and (e)(1), see *Wiggins* v. *Smith*, 539 U.S. 519, 528, 529, 530 (2003); *Miller-el* v. *Cockrell*, 537 U.S. 322, 340, 341-342, 348 (2003), and creates a conflict on the question within the circuit courts of appeals, cf. *Valdez* v. *Cockrell*, 274 F.3d 941 (CA5 2001), cert. denied, 537 U.S. 883 (2002). Most recently, since the filing of the State's petition, the Third Circuit Court of Appeals in *Lambert* v. *Blackwell*, Nos. 03-2282, 03-2283, 2004 WL 2283277, at *18 (CA3 Oct. 12, 2004), has also noted the uncertainty of habeas corpus law in this area.

Taylor's brief in opposition points to nothing that detracts from the "certworthiness" of the question of whether (d)(2) may trump (e)(1). He argues, primarily, that the Ninth Circuit's interpretation and application of (d)(2) and (e)(1) were simply correct. (Opp. 1-3.) But he does not deny that the relationship between § 2254(d)(2) and (e)(1) presents an important question of habeas corpus law. Nor does he come to grips with this Court's teaching, in *Miller-el* v. *Cockrell* and *Wiggins* v. *Smith*, that (d)(2) and (e)(1) represent separate hurdles for the petitioner to overcome. His discussion of *Miller-el* (Opp. 1-2) ignores the fact that, contrary to what this Court said there, the Ninth Circuit here specifically held that, where the federal court satisfies itself that the State-court adjudication does not pass muster under (d)(2), the federal court need not apply the (e)(1) presumption at all. (Pet. App. A9-A10, A25-A26.) Taylor's additional argument notwithstanding (Opp. 1-2), the fact that the Ninth Circuit ultimately purported to find "clear and convincing" evidence that assertedly might have overcome the (e)(1) presumption changes nothing. Not only does that erroneous ruling itself warrant certiorari review (see p. 4, *post*), but it does not diminish the damaging effect of the Circuit's clear holding that the (e)(1) presumption was rendered inapplicable by virtue of (d)(2) in the first place.

Nor does Taylor refute the existence of a conflict between the Ninth Circuit's holding and that of the Fifth Circuit in *Valdez* v. *Cockrell*, 274 F.3d 941. He offers merely the unremarkable proposition that, under AEDPA and *Valdez*, a State-court factual determination might be invalid under (e)(1) without also requiring rejection of the State-court's ultimate adjudication of the federal claim under (d)(2). (Opp. 2-3.) But he ignores what is most pertinent here: the *Valdez* decision's rejection of the notion, central to the Ninth Circuit's decision in this case, that (d)(2) now places in the path of the operation of (e)(1) the same kinds of obstacles that the AEDPA repealed in the course of strengthening the statutory presumption of correctness for State-court fact findings. (Pet. App. A10-A11.)

2. Even if § 2254(d)(2) could trump (e)(1), review still should be granted because the Ninth Circuit, in deeming the State court's ruling to be the product of a (d)(2) "unreasonable determination of the facts," also flouted this Court's prior decision in *Early* v. *Packer*, 537 U.S. 3 (2002) (*per curiam*).[1/] In *Packer*, this Court rejected the Ninth Circuit's view that a State adjudication becomes "unreasonable" under § 2254 unless it contains an explicit statement that the State court considered particular items of evidence. See 537 U.S. at 9. In the case at bar, however, the Ninth Circuit repeated its *Packer* mistake. It once again condemned a State-court adjudication as "unreasonable," not "in light of the evidence presented in the State proceeding" as required under (d)(2), but in the end because the State trial and appellate courts in explaining their rulings did not "mention" certain evidence that, as it turned out

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1. As recounted in the State's certiorari petition, *Packer* is but one of an unusually long line of cases in which this Court has been constrained to correct Ninth Circuit failures to afford State-court judgments the enhanced deference due to them since the passage of AEDPA in 1996. (Pet. 15.) The State, in this regard, further notes the pendency before this Court of two other certiorari petitions raising issues very similar to ones in this case: *Mueller* v. *Nunes*, No. 03-1452, and *Collins* v. *Rice*, No. 04-52.

a few years later, the federal panel believed to be significant. (Pet. App. A10-A26.) The Ninth Circuit's decision, grudging rather than deferential toward the State court, contravenes this Court's holding in *Packer*.

Taylor retorts that *Packer* dealt with § 2254(d)(1) rather than (d)(2). (Opp. 4-5.) But he nowhere even suggests why omitting to "mention" certain evidence might somehow render a State-court determination "unreasonable" under (d)(2) if the exact same omission would not render a State-court ruling "unreasonable" under closely-related (d)(1). In light of *Packer's* recognition that State courts need not make a "formulary statement" detailing the evidence it has considered, see 537 U.S. at 9, the Ninth Circuit's decision on this point warrants review in any event.

3. Certiorari is justified, further, to review and correct the Ninth Circuit's intrusive re-determination of State-court fact findings. In rejecting the State judge's fact findings and his determinations of the credibility of witnesses whose plausible testimony he personally observed—and instead making witness-credibility and other fact findings to the contrary on the basis of the "cold" State-court written record without any proper federal evidentiary hearing—the Ninth Circuit usurped the role of the State courts in the federal habeas corpus system as recognized in cases such as *Marshall* v. *Longberger*, 459 U.S. 422, 434 (1982), *Maggio* v. *Fulford*, 462 U.S. 111, 113 (1963), and *Rushen* v. *Spain*, 464 U.S. 114, 121 n.6 (1983) (*per curiam*).

Addressing this ground for certiorari, Taylor's brief (Opp. 5) cites the observation in *Miller-el* v. *Cockrell*—acknowledged in the State's petition (Pet. 12)—that a State court's credibility determinations sometimes might be overcome even under AEDPA. 537 U.S. at 340. But, as the State has argued (Pet. 12-13), rejection of such findings might occur in the rare or extreme case, but not in a case in which a witness observed by and deemed credible by the State judge gives plausible testimony that provides rational support for the State court's factual findings, and the federal court merely re-weighs the

evidence in the "cold" State-court transcript to draw opposite witness-credibility conclusions. That is what happened here.

Finally, Taylor erroneously asserts that the State is not contesting the correctness of the Ninth Circuit's credibility determinations. (Opp. 5.) For whatever role it might play in this Court's consideration of the State's certiorari petition, the State indeed asserts that the Ninth Circuit's findings were wrong. The State's certiorari petition in fact asserted both that the Ninth Circuit's constructions of § 2254(d) and (e) were erroneous, and that "[u]nder the proper version of the facts, as found by the State court, Taylor's *Miranda* and involuntary-confession claims were failures." (Pet. 8, 14.)

CONCLUSION

For these reasons, petitioner Maddox respectfully requests that the Court grant a writ of certiorari in this case.

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Respectfully submitted,

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